TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 23.

THOMAS C. REDFORD AND EMMA REDFORD, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 10, 1924.

(28,456.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 277.

THOMAS C. BEDFORD AND EMMA BEDFORD, APPELLANTS,

vs.

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INDEX.

	Original	Print.
Caption	1	1
Petition of Thos. C. Bedford (No. 20514)	1	1
Petition of Emma Bedford (No. 20515)	7	6
Amended petition of Thos. C. Bedford	9	8
Traverse	11	10
Findings of fact	12	10
Conclusion of law	13	12
Opinion	14	12
Judgment	18	19
Application for appeal	19	19
Order allowing appeal	19	19
Clerk's certificate	20	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 3, 1902.

1 In the Court of Claims.

THOMAS C. BEDFORD
v.
UNITED STATES. } No. 20514.

EMMA BEDFORD, THOMAS C. BEDFORD
v.
UNITED STATES. } No. 20515.

I.—*Petitions.*

(A.)—Petition in 20514. Filed Sept. 17, 1896.

THOMAS C. BEDFORD
vs.
THE UNITED STATES. } No. 20514.

The petition of Thomas C. Bedford, a citizen of the United States, residing in the State of Louisiana, respectfully represents that he became the owner in fee-simple, by inheritance on January 21, 1891, of the following-described lands in the State of Louisiana, to wit: Sections eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, twenty, twenty-one, and twenty-two, all in township fifteen, north; range fifteen, east.

2 Said petitioner further alleges that he is the sole and only heir-at-law of George M. Bedford, his brother, and that he was the sole and only heir when his brother departed this life, on January 21, 1891; and the said decedent owned said lands in fee-simple continuously from a date prior to the year 1879. Said decedent died intestate and no letters of administration were ever taken out on his estate and the debts of his estate, which were not consequential, were fully paid by your petitioner; that the said lands lay alongside of and abutting the Mississippi river, in said State of Louisiana; that to wit, in the years 1879 and '80, the said defendant, The United States, in the execution of its rights and powers, in and over said river, and in pursuance of its lawful control over the navigation of said river and for the betterment and improvement thereof, by its duly authorized officers and agents, made and caused to be made a certain revetment of willow, stone and other materials, at a point immediately up said river, a distance of about six miles from the north line of said described lands.

That said revetment was constructed along said river for a distance of one-half mile; that said revetment was so constructed at said point in and on said river as to effectually and completely divert the waters of said river from a southward course towards the east; and said revetment was constructed also for the purpose of keeping the bed of said river from moving westward at the point where said revetment was constructed and for the further purpose of protecting the harbor at the city of Vicksburg, in the State of Mississippi.

That said revetment was constructed in the years 1879 and 1880 as aforesaid and was rebuilt and improved by said defendant in the years 1892 and 1893. That the construction and maintainance of said revetment caused the waters of said river to be diverted from a south and southeasterly course to an easterly course, and to be thrown with great force against the east bank of said river, which bank extends from the north to the south, is high and strong and is composed of limestone and other hard substances, which do not give way to erosion. That said waters were diverted as aforesaid by said revetment against said east bank with great force, and *was* by said bank thrown back against the west bank of said river, also with great force at and against and along the bank of said west side, where said described sections of land were located.

That at the time of the construction of said revetment said lands were open and cultivated and the most of the same were highly improved and had negro cabins, residences, a steam gin and other permanent and lasting improvements on the same of the value of $15,000; and said improvements were injured, partly destroyed and appropriated by the diversion of said waters and were of the value of $15,000 when so injured, partly destroyed and appropriated, and many of said improvements had to be moved and set back at an expense of not less than $5,000.

Your petitioner's title to such part of said lands as were not destroyed and appropriated as aforesaid before May 1, 1895, was divested and passed from him on said date by a sale under a deed of trust.

3 Your petitioner alleges that said lands suffered little or no damage prior to the years 1885 and 1886; that nearly all of said invasion of waters, caving in of land and appropriation as aforesaid has taken place since said dates; that 1793 acres of said described lands were invaded, overrun and appropriated as aforesaid prior to May 1st, 1895, and that all of said acres above described are now in the bed of said river and are part of said navigable waterway and were appropriated to said waterway and the United States by the diverted waters of said river before said date, and had at the time of such destruction an even value of thirty dollars per acre.

And that the amount of depreciation, loss, damage and injury sustained by this claimant, your petitioner, by reason of the appropriation of said property as aforesaid, amounts as said claimants verily believes, to the sum of $58,000.00, for which no compensation whatever has been paid.

Second.

Your petitioner further represents that he is a citizet of the United States, residing in the State of Louisiana, and that he was the owner in fee-simpld by inheritance since January 21, 1891, of the following-described lands in the State of Louisiana, to wit: Sections eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, twenty, twenty-one and twenty-two, all in township fifteen, north; range fifteen, east.

Said petitioner alleges that he is the sole and only heir-at-law of

George M. Bedford, his brother, and that he was the sole heir when the said brother departed this life on said date; and the said decedent owned said lands in fee-simple continuously from a date prior to the year 1879. That said decedent died intestate and no letters of administration were ever taken out on his estate, and that the debts of his estate, which were not consequential were fully paid and satisfied by said heir; that the said lands lay alongside of and abutting the Mississippi river, in said State of Louisiana; that to wit, in the years 1879 and 1880 the said defendant, The United States, in the execution of its rights and powers in and over said river, and in pursuance of its control over the navigation of said river and for the betterment and improvement thereof, by its duly authorized officers and agents, made and caused to be made a certain revetment of willow, stone and other materials at a point immediately up said river, a distance of about six miles from the north line of said described lands. That said revetment was constructed along said river for a distance of one-half mile; and was so constructed at said point in and on said river as to effectually and completely divert the waters of said river from a southward course to an easterly course; and said revetment was constructed also for the purpose of keeping the bed of said river from moving westward at the point where the same was constructed and for the further purpose of protecting the harbor at the city of Vicksburg, in the State of Mississippi.

That said revetment was constructed in the years of 1879 and 1880 as aforesaid, and was rebuilt and improved by said de-
4 fendant, in the years 1892 and '93. That the construction and maint*a*inance and preservation of said revetment by said defendant caused the waters of said river to be diverted from a south and southeasterly course, to an easterly course, and to be thrown with great force against the east bank of said river, which bank extends from the north to the south, and is high and strong and is composed of limestone and other hard substances, which do not give way to erosion. That said waters were diverted as aforesaid by said revetment against said east bank with great force and *was* by said east bank thrown back against the west bank of said river also with great force, at and against and along the bank of said west side, where said described sections were located.

That at the time of the construction of said revetment and for a time afterwards said lands were open and cultivated and most of the same were highly improved and had negro cabins, residences and fences, a steam gin, and other permanent and valuable improvements on the same, of the value of $5,000, and that said improvements were located on that part of said described lands which were destroyed prior to January 21, 1891, and that said improvements were injured, partly destroyed and appropriated by said diverted waters, along with the acres of land hereinafter described; and said improvements were of the value of $5,000, when they were so destroyed and appropriated, and many of said improvements had to be moved and set back at great expense to wit: $1,000.

And your petitioner alleges that said described lands suffered

little or no damage prior to the years 1885 and 1886 and that nearly all of said invasion of said waters, caving in and appropriation of lands has taken place since said date.

That 404 acres of said described lands were invaded, overrun and appropriated, as aforesaid, together with said improvements prior to January 21, 1891 and that all of the said acres, last above described are within the banks of said river and part of said navigable waterway and were appropriated to said waterway and the United States by the diverted waters of said river before said date and that said acres so appropriated had at the time of such destruction and appropriation, an even value of thirty dollars per acre.

And the amount of depreciation, loss, damage and injury sustained by this claimant, your petitioner, by reason of the appropriation of said property as aforesaid, amounts as claimant verily believes to the sum of $13,000, for which no compensation whatever has been paid.

Third.

Your petitioner further represents that he is a citizen of the United States, residing in the State of Louisiana, and he was the owner in fee-simple, by inheritance from January 21, 1891, of the following-described lands in the State of Louisiana, to wit: Sections eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, twenty, twenty-one and twenty-two all in township fifteen, north; range fifteen, east.

5 Said petitioner alleges that he is the sole and only heir-at-law of George M. Bedford, his brother, and that he was the sole heir when his said brother departed this life, on said date; and the said decedent owned said lands in fee-simple continuously from a date prior to the year 1879. Said decedent died intestate and no letters of administration were ever taken out on his estate and the debts of his estate, which were not consequential, were fully paid by said heir; that said lands lay alongside of and abutting the Mississippi river, in the State of Louisiana; that to wit, in the years of 1879 and '80 the said defendant, The United States, in the execution and exercise of its rights and powers in and over said river, and in pursuance of its lawful control over the navigation of said river and for the betterment and improvement thereof, by its duly authorized officers and agents, made and caused to be made, a certain revetment of willow, stone and other materials at a point immediately up said river, a distance of about six miles from said described lands. That said revetment was constructed along said river for a distance of one-half mile; that said revetment was so constructed, at said point in and on said river as to effectually and completely divert the waters of said river from a southward course to an easterly course; and said revetment was constructed also for the purpose of keeping the bed of said river from moving westward at the point where said revetment was constructed and for the further purpose of preserving the harbor for the city of Vicksburg, in the State of Mississippi; that said revetment was constructed in the years 1879 and 1880 and was rebuilt and improved by said defendant in the years 1892 and 1893.

That the construction, repair and maintainance of said revetment caused the waters of said river to be diverted from a south and southeasterly course, to an easterly course, and to be thrown with great force against the east bank of said river, which bank extends from the north to the south, is high and strong and is composed of limestone and other hard substances which do not give way to erosion. That said waters were diverted as aforesaid by said revetment against said east bank with great force and *was* by said bank thrown back against the west bank of said river at and along the bank of said west side where said described sections were located.

That at the time of the construction of said revetment said lands were open and cultivated and that most of the same were highly improved and had negro cabins, fences, residences, a steam gin, and other permanent and lasting improvements on the same to the value of $10,000. And that said improvements were located upon that part of said lands which were destroyed and appropriated by the waters of said river during that period of time between January 21, 1891 and May 1st 1895, and said improvements were injured, partly destroyed and appropriated by said diverted waters and were of the value at the time of such destruction and appropriation, of $10,000, and many of said improvements had to be removed and set back at great expense, to wit: $4,000.

6 Your petitioner's title to such a part of said lands as were not destroyed by said diversion and appropriation, before May 1st, 1895, *were* divested and passed from him, by a sale under a deed of trust. And your petitioner alleges that said land suffered little or no damage prior to the years 1885 and 1886; that nearly all of said invasion of diverted waters and caving in and appropriation of lands have taken place since said years 1885 and 1886.

That 1389 acres of said described lands were invaded, overrun and appropriated, as aforesaid during the period between January 21, 1891, the date of said decedent's death and May the 1st, 1895, when the title of your petitioner to such a part of said lands as were not then destroyed *were* divested as aforesaid, and all of said acres which were appropriated during said period are covered with the waters of said river and have been enclosed within the banks of said river and are part of its bed and were appropriated to the waters of said waterway and the United States by the diverted waters of said river during said period and that said acres had at the time of such destruction and appropriation an even value of thirty dollars per acre.

And that the amount of depreciation, loss, damage and injury sustained by this claimant, your petitioner, by reason of the appropriation of said real estate and the destruction of said permanent and lasting improvements, amounts as said claimant verily believes to the sum of $46,000, for which no compensation whatever has been paid.

Your petitioner further represents that he is the sole owner of said claim for all the above-described injury, damage, loss, and that he has not sold, transferred or assigned the same or any part thereof.

Wherefore your petitioner prays judgment for $58,000, his costs, and all other necessary and proper relief.

T. C. BEDFORD.

C. L. TREVITT,
Attorney for Petitioner.
E. V. BROOKSHIRE, *Of Counsel.*

STATE OF MISSISSIPPI, }
County of Warren, } *ss:*

T. C. Bedford, being duly sworn, deposes and says that he is the petitioner above named, that he has read the foregoing petition by him subscribed and knows the contents thereof and that the facts therein stated of his own knowledge are true and those stated on information and belief he believes to be true.

T. C. BEDFORD.

Subscribed in my presence and sworn to before me this 24th day of July, 1896.

JOHN BRUNINI,
Notary Public.

7 (B.)—*Petition in No.* 20515. *Filed Sept.* 17, 1896.

EMMA BEDFORD, THOMAS C. BEDFORD
vs.
THE UNITED STATES. } No. 20515.

The petition of Emma Bedford, the wife of Thomas C. Bedford, a citizen of the United States, residing in the State of Louisiana, respectfully represents that she became the owner in fee-simple of such a part of the following-described lands, on May the 1st, 1895, as had not been overrun and destroyed by the waters of the Mississippi river, which lands are situated in the State of Louisiana, and are described as follows, to wit:—Sections eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, twenty, twenty-one and twenty-two, all in township fifteen, north; range fifteen east; that said lands lay alongside of and abutting the Mississippi river; that to wit: in the years 1879 and '80 the said defendant, The United States, in the execution of its rights and powers in and over said river, and in pursuance of its lawful control over the navigation of said river and for the betterment and improvement thereof, by its duly authorized officers and agents, made and caused to be made a certain revetment of willow, stone and other material, at a point immediately up said river a distance of about six miles from the north line of said described land.

That said revetment was constructed along said river for a distance of one-half mile; that said revetment was so constructed, at said point in and on said river, as to effectually and completely divert the waters of said river from a southward course toward the east; and said revetment was constructed also for the purpose of keeping the bed of said river from moving westward at the point of

said construction and for the further purpose of preserving the harbor for the city of Vicksburg, in the State of Mississippi.

That said revetment was constructed in the years 1879 and '80 as aforesaid, and was rebuilt and improved by said defendant in the years 1892 and 1893. That the construction and maintainance of said revetment caused the waters of said river to be diverted from a south and southeasterly course to an easterly course, and to be thrown with great force against the east bank of said river, which bank extends from the north to the south; is high and strong and is composed of limestone and other hard substances, which do not give way to erosion. That said waters are diverted as aforesaid by said revetment against said east bank with great force and *was* by said bank thrown back against the west bank of said river also with great force, at and along the bank of said west side, where said described sections of land are located.

That when your petitioner became the owner of said lands they were open and cultivated and in a high state of improvement and had negro cabins, fences, houses and other valuable improvements on the same and that such improvements were permanent and lasting and were of the value of five thousand dollars. And said improvements were injured, destroyed and appropriated by said diverted waters and were of the value of five thousand dollars when so destroyed and appropriated and were located upon that part of said described lands which were destroyed and appropriated since May the 1st, 1895.

That 352 acres of said described lands were invaded, overrun and appropriated as aforesaid since said date.

And that all of said acres so appropriated are now covered with the waters of said river and are part of said navigable waterway, and were appropriated by said waterway and the United States by said diverted waters; and that said acres had at the time of such destruction and appropriation an even value of thirty dollars per acre.

And that the amount of depreciation, loss, damage and injury sustained by this claimant, Emma Bedford, by reason of the appropriation of said property as aforesaid, amounts as said claimant verily believes to the sum of $16,000, for which no compensation whatever has been paid.

Your said petitioner, Emma Bedford, further represents that she is the sole owner of said claim and has not sold, transferred or assigned the same or any part thereof.

Wherefore your petitioner prays judgment for $16,000, her costs, and all other necessary and proper relief.

EMMA BEDFORD.

C. L. TREVITT,
Attorney for Petitioner.
E. V. BROOKSHIRE, *Of Counsel.*

STATE OF LOUISIANA, *Parish of Madison,* } ss:

Emma Bedford being first duly sworn deposes and says that she is the petitioner above named, that she has read the foregoing petition by her subscribed and knows the contents thereof, and that the facts therein stated of her own knowledge are true and those stated on information and belief she believes to be true.

EMMA BEDFORD.

Subscribed in my presence, and sworn to before me this 25th day of July, A. D. 1896.

P. J. WATSON,
Justice of the Peace.

9 (C.)—*Amended Petition. Filed February* 28, 1898.

THOMAS C. BEDFORD
vs.
THE UNITED STATES. } No. 20514.

Your petitioner, Thomas C. Bedford, by leave of court first had and obtained, files this his amended petition, and respectfully represents as follows:

1. That he is a citizen of the United States, residing in the State of Louisiana, and brings this petition in his own right against the respondent, The United States of America.

2. That heretofore, to wit: on the 21st day of January, 1891, George M. Bedford, a citizen of the United States and a resident of said State, died intestate, seized in fee of the following-described real estate, situated, lying and being in the State of Louisiana, and being known as sections eleven (11) twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), twenty (20), twenty-one (21), and twenty-two (22) in township fifteen (15), north, range fifteen (15) east, leaving your petitioner as his only heir-at-law and next of kin, and as such your petitioner became the owner of said land in fee-simple.

3. That said lands lay along and abutting the Mississippi river about six miles from a certain revetment at Delta peninsula, Louisiana. That during the years from 1878 to 1894, inclusive, the said respondent The United States, in the execution of its rights and powers, and in pursuance of its lawful control over the navigation of said river, and for the betterment and improvement thereof, did, by its duly authorized officers and agents, make or cause to be made and constructed said revetment, which was composed of willow, stone and other suitable materials, at a point immediately up said river at a distance of about six miles from the line of the land aforesaid.

4. That said revetment was constructed along said river at and around the upper bank and point of said Delta peninsula, for the purpose of keeping the bed of said river from moving westward and

destroying the land on which the town of Delta is located, and also for the purpose of protecting the harbor at the city of Vicksburg, in the State of Mississippi.

5. That the construction and maintenance of said revetment during the period from February 1st, 1891, to May 1st, 1895, caused the water of said river to be diverted from its original channel, a southerly course, and to be thence thrown with great force against the east bank of said river, which east bank is composed of limestone and other hard substances which will not give way to erosion.

6. That by reason of said waters being diverted from their original course and ancient channel by said revetment, and being thrown against the east bank of said river with such force, they were caused to rebound and to be thrown back against the west bank of same, where the lands of your petitioner are located; completely overflowing and destroying seventeen hundred and ninety-three (1,793) acres of same, together with the improvements thereon.

7. That the officers and agents of The United States, the respondent, well knew at the time of the construction of said revetment, that the same would divert the waters of said river from its original and ancient channel, and throw them against and over your petitioner's land.

8. That at the time your petitioner became the owner of said lands, in the year 1891, they were open and in a good state of cultivation, and were improved with cabin residences, a steam cotton gin and other permanent and valuable improvements, the lowest value of which being $15,000, and which were injured, partly or totally destroyed or appropriated by the diversion of the waters of said river.

9. Your petitioner therefore alleges that said seventeen hundred and ninety-three acres of land were invaded, overrun, appropriated and destroyed during said period of time by reason of the diversion of the waters of said river, and that all of same are now in the bed of said river, forming a part of its navigable waterway. Your petitioner further alleges that all of said land was worth, at the time of the destruction of same, at least thirty dollars ($30) per acre, and that the amount of depreciation, loss, damage and injury sustained by your petitioner, by reason of the appropriation of the property, and the damage to the improvements aforesaid amounts to fully $58,000, for which he has received no compensation whatever.

Your petitioner further represents that he is the sole owner of said claim for the above-described injury and damage, and that he has not sold, transferred, or assigned the same or any part thereof.

Wherefore your petitioner prays judgment for the sum of fifty-eight thousand ($58,000) dollars, his costs, and all other necessary relief.

T. C. BEDFORD.

C. L. TREVITT,
Attorney for Petitioner.
E. V. BROOKSHIRE, *Of Counsel.*

STATE OF LOUISIANA, *Parish of Madison,* } ss:

Thomas C. Bedford, being first duly sworn, deposes and says that he is the petitioner above named, that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the facts therein stated of his own knowledge are true, and these stated upon information and belief he believes to be true.

T. C. BEDFORD.

Subscribed in my presence and sworn to before me this 13th day of June, 1897.

JOHN BRUNINI,
Notary Public.

[SEAL.]

11 II.—*Traverse. Filed January* 22, 1901.

THOMAS C. BEDFORD
vs.
THE UNITED STATES. } No. 20514.

EMMA BEDFORD
vs.
THE UNITED STATES. } No. 20515.

And now comes the Attorney General, on behalf of the United States, and answering the petitions of the claimants herein, denies each and every allegation therein contained; and asks judgment that the said petitions be dismissed.

L. A. PRADT,
Assistant Attorney General.

12 III.—*Findings of Fact and Conclusion of Law as Amended February* 3, 1902, *and Filed as of October* 28, 1901.

The above-entitled causes having been heard by the Court of Claims, the court, upon the evidence, makes the following findings of fact:

I.

The claimants herein, Thomas C. Bedford and Emma Bedford his wife, are citizens of the United States, residing at Vicksburg, in the State of Mississippi.

II.

In March, 1877, and November, 1889, George M. Bedford acquired by purchase sections 11, 12, 13, 14, 15, 16, 17, 20, 21, and 22 in township 15 north, range 15 east, containing 5,000 or 6,000 acres of land, together with cabins, other buildings, and fences thereon, lying and being in Madison parish, in the State of Louisiana, which lands he continued to hold and possess until January, 1891, when he died intestate, leaving as his only heir-at-law his brother, Thomas C. Bedford, one of the claimants herein. Said Thomas C. Bedford claims

to have been the owner of said described real estate in fee-simple, and for the purpose of this suit is so found to have been, until the said lands were sold at judicial sale in May, 1895, to the claimant, Emma C. Bedford, his wife, to satisfy a mortgage theretofore executed by him on said described lands. His said wife Emma, claimant herein, now claims to be the owner of said described lands in fee-simple, and for the purpose of this suit is so found to be.

At the time of the death of said George M. Bedford about 850 acres of said lands were cleared, and at the time the claimant, Emma Bedford, became the owner thereof by purchase, as aforesaid, about 1,300 acres of said lands were cleared.

III.

Prior to the spring of 1876 the Mississippi river flowed around a narrow neck of land known as De Soto point, and in going around this point flowed by the city of Vicksburg in a southwesterly direction. In the spring of 1876 De Soto point became so narrow by erosion that the river broke through, leaving De Soto point as an island, thereby shortening the distance of the stream about 6 miles and taking its course immediately to the south with great velocity against the Mississippi bank at what is known as the cut-off of 1876. The result was that the city of Vicksburg was left some miles away from the main channel of the river, and the old channel in front of the city was continually filled up, making the approach from the river to the docks along the river difficult if not impossible.

IV.

Between 1878 and 1884 the United States constructed about 10,700 feet of revetment along the banks of the Mississippi river at Delta point, Louisiana, for the purpose of preventing the further erosion of that point. The revetment consisted of willow mattresses weighted down by stones, and were placed on sand banks below high-water mark. The revetment was neither upon nor in contact with the claimants' lands. The object of the construction was to prevent the navigable channel of the river from receding farther from the city of Vicksburg, which had been left some distance from the main channel of the river by the cut-off of 1876, as aforesaid. The revetment was repaired slightly in 1886 and 1889, and more extensively in 1894, all of which work was paid for from time to time out of the appropriations made therefor by Congress, as found in 20 Stat. L., 363, 366; 21 Stat. L., 181, 470; 26 Stat. L., 450, 1116.

V.

In making the improvement aforesaid the defendants did not recognize any right of property in the claimants in and to the right alleged to be affected, and did not assume to take private property in and by the construction of the revetment, but proceeded in the exercise of a claimed right to improve the navigation of the river.

13

VI.

After the cut-off at De Soto point in 1876 and the construction of the revetment, as aforesaid, the channel and current of the Mississippi river were gradually directed toward the lands of the claimants, situated about 6 miles below said cut-off *and did*, about the year 1882, reach said lands and thereafter erode and overflow about 2,300 acres of their lands, which overflow has ever since continued. About 400 acres of their lands so eroded and overflowed was prior to the death of said George M. Bedford, through whom the claimants claim title, and about 900 acres of which were overflowed thereafter and prior to said judicial sale, and the residue after said sale. Of the lands so overflowed about 1300 acres thereof were cleared and in cultivation, of which about 700 acres were so cleared prior to May 2, 1895.

The damage to the claimants, and each of them, by reason of the washing away of their lands during their respective ownership, as aforesaid, is an excess of $3,000.

VII.

The cause of the deflection of the river upon the claimants' land was the cut-off which shortened the distance of the stream 6 miles and thereby increased the velocity of the current, and forced the current to turn, when it struck the Mississippi bank, at an abrupt angle. The revetment did not change the course of the river as it then existed, but operated to keep the course of the river at that point as it then was. If the revetment had not been built the cut-off would have continued to widen toward the Louisiana bank, and the channel would have continued to move in the same direction. With the widening of the cut-off and the shifting of the channel the angle at the turn below the cut-off would have gradually become less abrupt, and the deflection of the stream upon the claimants' land would have grown less, and the consequent injury to the claimants' land would have been decreased. To what extent the injury would have been decreased is conjectural. The injury done to the claimants' land was an effect of natural causes; the injury caused by the Government was by interrupting the further progress of natural causes, *i. e.*, the further change in the course of the river, and is also conjectural.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimants are not entitled to recover, and their respective petitions are therefore dismissed.

By the COURT.

14

IV.—*Opinion of the Court.*

Peelle, J., delivered the opinion of the court.

The claimants in this action seek to recover $74,000 on account of damages alleged to have been sustained by the overflow and the

washing away of the buildings and fencing thereon of about 2,300 acres of land owned by them successively on the west bank of the Mississippi river in Madison county, La., located about 6 miles below the city of Vicksburg, $58,000 of which is claimed by Thomas C. and $16,000 by his wife, Emma.

Prior to 1876 the Mississippi river flowed around a narrow point of land known as De Soto point, and in going around this point flowed by the city of Vicksburg in a southwesterly direction. In the spring of 1876 De Soto point became so narrowed by erosion that the river broke through, leaving De Soto point as an island, and taking its course immediately to the south. The result was that the city of Vicksburg was left some miles away from the main channel of the river, and the old channel continually filled up, thereby making the approach from the river to the docks in front of the city very difficult.

In consequence of that cut-off the United States, by their officers and agents, between 1878 and 1884, constructed about 10,700 feet of revetment along the banks of the river at Delta point, on the Louisiana side, for the purpose of preventing further erosion. The revetment consisted of willow mattresses weighted down by stones which were placed on the banks of the river below high-water mark, though not on or in contact with the lands of the claimants. The object of the construction was to prevent the navigable channel of the river from receding farther from the city of Vicksburg. The revetment was repaired in 1886 and in 1889, and still more extensively in 1894, all of which work was paid for out of the appropriations made by Congress from time to time. (20 Stat. L., 363, 366; 21 Stat. L., 181, 470; 26 Stat. L., 450, 1116.)

The effect of the revetment, as intended, was to preserve the banks of the river at Delta point in the same position and condition they were in at the time the revetment was built.

In making the improvement the defendants did not recognize any right of property in the claimants in or to the right alleged to be affected; nor did they assume to take private property in the construction, but proceeded in the exercise of their right to improve the navigation of the river.

After the cut-off at De Soto point in 1876, and the construction of the revetment thereafter, the current of the river was directed against and upon the lands of the claimants, situate about 6 miles below, and thereby overflowed and washed away the buildings and fences thereon to the damage of each of said claimants in a sum in excess of $3,000.

The claimants' contention is that, by the construction of the revetment, the channel of the river was diverted from its natural course and thereby made to overflow their lands depriving them of their use; which overflow, they contend, was the taking of private property for public use, for which just compensation should be made within the meaning of the fifth amendment to the Constitution, as in effect construed by the Supreme Court in the case of *Pumpelly v. Green Bay Company*. (13 Wall., 166.)

In that case Pumpelly brought trespass on the case against the

Green Bay Company for overflowing 640 acres of his land by means of a dam erected across Fox river, the northern outlet of Lake Winnebago, by reason of which the waters of the lake were raised so high as to forcibly and with violence overflow said land, tearing up his trees and grass by the roots and washing them, with his hay, away, choking up his drains and filling up his ditches, and otherwise injuring his lands by leaving deposits of sand, etc.

On that state of facts the court, in construing the provision of the constitution of Wisconsin, which provides that "the property of no person shall be taken for public use without just compensation therefor," said: "But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken. And perhaps no State court has given more frequent utterance to the doctrine that overflowing land by backing water on it from dams built below is within the constitutional provision than that of Wisconsin. In numerous cases of this kind, under the mill and milldam act of that State, this question has arisen, and the right of the mill-owner to flow back the water has been repeatedly placed on the ground that it was a taking of private property for public use. It is true that the court has often expressed its doubt whether the use under that act was a public one, within the meaning of the constitution, but it has never been doubted in any of those cases that it was such a *taking* as required compensation under the constitution. As it is the constitution of the State that we are called on to construe, these decisions of her supreme court,
15 that overflowing land by means of a dam across a stream is taking private property within the meaning of that instrument, are of special weight if not conclusive on us. And in several of these case the dams were across navigable streams." * * *

"We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual, arising from the prosecution of improvements of roads, streets, rivers and other highways for the public good, there is no redress; and we do not deny that the principle is a sound one in its proper application to many injuries to property so originating. And when in the exercise of our duties here we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country and certainly not

with sound principle. Beyond this we do not go, and this case calls us to go no further."

In that case the overflow was caused by the dam constructed at the outlet of the lake, which raised the water above the ordinary level.

The dam was constructed pursuant to an act of the legislature of Wisconsin. The lands were not absolutely taken or converted to the uses of the public, but the owner, by reason of the overflow, was deprived of their possession and use, and that deprivation of private property was held to be a taking for public use for which compensation should be made within the meaning and intent of the constitution of Wisconsin. To the same effect, also, is the case of *Eaton v. Boston, Concord and Montreal Railroad Company* (51 N. H., 504).

Later, in the case of *Transportation Company v. Chicago* (99 U. S., 635, 642) the court referring to the authorities collected at page 542, Cooley's Constitutional Limitations, says that in those two cases—that is, the Pumpelly case and the Eaton case (*supra*)—is to be found, perhaps, "the extremest qualification of the doctrine."

The Government is only liable for the acts of its agents within the reasonable scope of their authority, and if they exceed that their acts are wrongful, for which the Government is not liable. *Langford v. United States* (101 U. S., 341); *Hill v. United States* (149 U. S., 592).

In the present case, however, the officers and agents of the Government were authorized by sundry acts of Congress to improve the Mississippi river in the interest of navigation, and the construction of the revetment for the protection of the harbor of Vicksburg appears to have been within the limits of their authority. (20 Stat. L., 363, 366; 21 Stat. L., 181, 470; 26 Stat. L., 450, 1116.)

The power to control and improve the navigable rivers in the United States is derived from article 1, section 8, of the Constitution, which grants to Congress the power "to regulate commerce with foreign nations and among the several States," and is complete in itself, and may be exercised to its utmost extent consistent with the limitations prescribed in the Constitution. *Gibbons v. Ogden* (9 Wheat., 1, 196). The power to regulate commerce with foreign nations and among the several States includes the power to control for that purpose "all the navigable waters of the United States which are accessible from a State other than those in which they lie." *Gilman v. Philadelphia* (3 Wall., 713, 724); *Genese Chief v. Fitzhugh* (12 Howard, 443); *Illinois Central Railroad Company v. Illinois* (146 U. S., 387).

That the Government had the undoubted power and authority to improve the river by the construction of the revetment, as it did, is conceded by the claimants; but their contention is that, by reason of the construction, the channel of the river was diverted from its natural course, thereby overflowing their lands and depriving them of their use as the proximate result thereof.

Therefore, in the construction of the revetment for the improvement of navigation in the interest of commerce the Government was in the rightful control of the river and to that extent and for that

purpose was the owner. Or, as was said in the case of *Gilman v. Philadelphia* (*supra*), "for this purpose they are the public property of the nation and subject to all the requisite legislation by Congress." The appropriations made from time to time for the improvement of the river was an assertion of a right belonging to the Government.

Where the Government takes property for public use, asserting no title thereto, but, on the other hand, conceding the same to be private property, an implied contract will arise to make just compensation therefor, as was held in the case of the *Great Falls Manufacturing Company v. United States* (112 U. S., 645). But that case is not controlling in the present case.

16 As to the questions of fact going to the cause of the deflection of the river and the effect of the revetment on the stream, we have found in finding VII that the cause of the deflection of the river upon the claimants' land was the cut-off which shortened the distance of the stream 6 miles, and thereby increased the velocity of the current and forced the current to turn when it struck the Mississippi bank at an abrupt angle. The revetment did not change the course of the river as it then existed, but operated to keep the course of the river at that point as it then was. If the revetment had not been built, the cut-off would have continued to widen toward the Louisiana bank, and the channel would have continued to move in the same direction. With the widening of the cut-off and the shifting of the channel, the angle at the turn below the cut-off would have gradually become less abrupt, and the deflection of the stream upon the claimants' land would have grown less, and the consequent injury to the claimants' land would have been decreased. To what extent the injury would have been decreased is conjectural. The injury done to the claimants' land was an effect of natural causes; the injury caused by the Government was by interrupting the further progress of natural causes, *i. e.*, the further change in the course of the river, and the extent of such injury is conjectural.

In the case of *Gibson v. United States* (166 U. S., 269, 271), affirming the judgment of this court (29 C Cls. R., 18), where numerous authorities are collated and commented upon, the claimant, as owner of land bordering on the Ohio river, had riparian rights, of which she was deprived by reason of the construction, by authority of an act of Congress, of a dike which diverted the water from the claimant's frontage, thereby causing her great damage, yet the court held that "although the title to the shore or submerged soil is in the various States and individual owners under them, it is always subject to servitude in respect to navigation created in favor of the Federal Government by the Constitution." It was also held, in substance, that riparian ownership was subject to the dominant right of the Government to improve navigation, and that the damage resulting from the construction of the dike for the public good was not the result of a taking of the claimant's property, but that the same was "merely incidental to the exercise of a servitude to which her property had always been subject."

That case, however, differs from the case of *Pumpelly v. Green Bay Company* (*supra*) in this, that in the latter case there was a physical invasion of the claimant's property by flooding, while in the former there was no invasion.

In the case of *South Carolina v. Georgia* (93 U. S., 4, 11) it was said: "It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage. If, as we have said, the United States have succeeded to the power and rights of the several States, so far as control over interstate and foreign commerce is concerned, this is not to be doubted."

Thus reviewing the authorities and the facts of this case, was the overflow of the claimants' lands and the washing away of the improvements thereon the result of the exercise by the Government of its right of eminent domain, and if so, upon what theory?

The claimants were deprived of their lands by natural causes, and if any injury was added thereto by the acts of the Government it was consequential and the extent thereof is conjectural; nor was anything said between the parties looking to an appropriation of the land.

The Government not only has the unquestioned power to improve the navigable rivers of the United States, but in respect to those rivers "accessible from a State other than those in which they lie" the improvement rests with the Government; and when injury results to lands from natural causes, affecting commerce, shall the Government delay improvement until from natural causes such injury has been righted?

In the *McIntire case* (25 C. Cls. R., 200) the United States quarried stone near a coal mine in such manner that the mine was flooded, and the claimant contended that it was a taking of his property under the right of eminent domain within the meaning of the *Pumpelly* and *Great Falls cases* (*supra*); but the court said: "In the Great Falls case, upon which plaintiff particularly relies, there was an actual appropriation of the property for the purpose of constructing an aqueduct; it was taken avowedly as private property,
17 to which the Government asserted no title, and was used for the public benefit. The making of the improvements necessarily involved the taking of this property, and when taken it was applied to a public use. In the case at bar appear none of these elements. There was no action by the Government officers looking to a taking of this property; there was no communication of any kind between plaintiff and defendants except a statement made by a subordinate that the Government would make good any injury sustained by plaintiff. It certainly never was intended to appropriate the mine even for temporary purposes, and the flooding of itself was of no benefit to the Government." See also the *Johnson's case* (31 C. Cls. R., 262).

We think it may now be regarded as settled that no implied contract can arise where the Government takes property claiming title and right thereto, and in the Gibson case in this court (29 C. Cls. R., 25), in speaking of that phase of the question, the court said: "The fact that the Government denies the title to the party and bases its action upon a right of its own repels the presumption upon which an implied contract is founded. There can be no contract unless the parties, either by expression or implication, agree; and where the United States deny the title of plaintiff in a taking, the law will not imply, as against the claim of the Government, an agreement to pay. Contracts are made by the agreements and implications arising from acts of parties, and not from their denials and differences."

Later, in the Friend case (30 C. Cls. R., 94), where the Government had changed a channel of the James river, resulting in the destruction of an adjacent landing by lessening the depth of water in front of it, the court, among other things, said: "Whatever may be said of the liability of the defendants, they were, as they understood it, not in the exercise of the power of eminent domain in the improvement of the river. It was in pursuance of the general policy of river and harbor improvements as recognized by acts of Congress for many years."

Such was the situation in the present case. The Government, by the exercise of its general policy of improving the navigation of the river in the interest of commerce and for the protection of the harbor at Vicksburg, constructed, by authority of appropriations of money made by Congress therefor, the revetment; not to raise or lower the water or to divert the channel of the river, but merely to hold the channel where from natural causes it had been placed.

The taking of private property under the right of eminent domain, an act of sovereignty sanctioned by the Constitution, cannot be exercised by the officers of the Government so as to fix contractural relations without authority looking to the appropriation of such property as the proximate result of their lawful acts; or by the public use and occupation of private property with the knowledge thereof and acquiescence therein by the proper officers of the Government, that is to say, to entitle the claimants to maintain an action in this court for the overflow of their lands, it must be made to appear that their right is founded upon a contract, express or implied.

18 Hence we must hold that though the injury to the claimants' lands might have been diminished in course of time by further erosion and the consequent shifting of the channel had the revetment not been built, still the fact remains that the injury done was the effect of natural causes, from which no implied contract to pay therefor can arise.

For the reasons we have given the claimants' petitions, and each of them, must be dismissed, which is ordered accordingly.

V.—*Judgment of the Court.*

THOMAS C. BEDFORD
vs.
THE UNITED STATES. } 20514.

EMMA BEDFORD
vs.
THE UNITED STATES. } 20515.

At a Court of Claims held in the city of Washington on the 3d day of February 1902 judgment was ordered to be entered in the above-entitled causes, *nunc pro tunc* as of October 28, 1901 as follows:

The court on due consideration of the premises find for the defendants, and do order, adjudge and decree that the petitions of Thomas C. Bedford, and of Emma Bedford be dismissed.

BY THE COURT.

19 VI.—*Application for and Allowance of Appeal.*

THOMAS C. BEDFORD, EMMA BEDFORD
vs.
UNITED STATES. } Nos. 20514 and 20515.

From the judgment of the court in the above-named causes rendered February 3, 1902, in favor of the defendants, the claimants by their attorney therein, this 20th day of February 1902, hereby make application for, and give notice of an appeal to the Supreme Court of the United States.

THOMAS C. BEDFORD,
EMMA BEDFORD,
Claimants,
By JOHN C. CHANEY,
Their Attorney.

Filed February 20, 1902.

Ordered: That this appeal be allowed as prayed for.

BY THE COURT.

February 20, 1902.

20 Court of Claims.

THOMAS C. BEDFORD
vs.
UNITED STATES. } No. 20514.

EMMA BEDFORD
vs.
UNITED STATES. } No. 20515.

I, John Randolph, assistant clerk of the Court of Claims hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled causes, of the findings of fact and conclusion of law

filed by the court, of the opinion of the court, of the judgment of the court dismissing the petitions, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereun' set my hand and affixed the seal of said Court of Claims this 15th day of March, A. D. 1902.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 18,456. Court of Claims. Term No. 277. Thomas C. Bedford and Emma Bedford, appellants, *vs.* The United States. Filed March 19, 1902.